No. 80-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 29, 1980

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MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*

National Broadcasting Company, Inc. ("NBC") respectfully petitions for leave to file the annexed brief, *amicus curiae*. NBC owns and operates a nationwide television network which is licensed by ASCAP and BMI and is presently paying the two societies combined millions of dollars per year for the right to perform musical compositions in their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), and *United States* v. *BMI*, 1966 Trade Cas. ¶ 71,941 (S.D.N.Y. 1966). Consequently,

NBC requests permission to file the annexed brief, *amicus curiae.*

Dated: New York, New York
September 29, 1980

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

National Broadcasting Company, Inc. ("NBC") respectfully submits this brief, *amicus curiae*, in order to advise the Court as to its interest in and position with respect to the issues presented in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Interest of the *Amicus Curiae*

The NBC Television Network is one of the nationwide television networks licensed by ASCAP and BMI and is presently paying the two licensing societies combined mil-

lions of dollars per year for blanket licenses to perform musical compositions for their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP*, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), and *United States* v. *BMI*, 1966 Trade Cas. ¶71,941 (S.D.N.Y. 1966).

Argument

Although NBC has not sought the kind of relief sought by its competitor, CBS, it too has had its differences with ASCAP and BMI over the years concerning the societies' insistence upon a "blanket all-or-nothing license" * which "requires users to buy more music than they want at a price which . . . may well be far higher than what they would choose to spend for music in a competitive system".** This observation is particularly true in the case of present day network television broadcasting where the lack of competition for music rights presents a unique anomaly.

In every other element of network television programming, price is determined by competitive forces—by one network bidding against the others for programs and by the various program suppliers competing with one another in offering their programs to the networks. Only when it comes to the right to publicly perform copyrighted music

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* As the Court of Appeals recognized in its first opinion, the per program license provided for in the ASCAP consent decree "is simply another form of blanket license" whose utility is "limited to broadcasters whose schedule consists predominantly of non-musical programming." 562 F.2d 130, 133, 134 n. 9 (2d Cir. 1977).

** *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 30, 31-32 (1979) (dissenting opinion).

is a program element carved out and put beyond competitive forces.

While such a result may be a practical necessity with respect to certain music users, it does not follow that all music must be excluded from the competitive arena in the realm of present day network television. The major portion of the music used on network television today is controlled by a mere handful of parent companies (by and large the established motion picture producers) which have both an ASCAP and BMI publishing subsidiary. These "publishers" perform few, if any, of the traditional functions of a music publisher and exist mainly as a vehicle to qualify for the receipt of ASCAP and BMI royalties. In terms of gross revenues, it is the parents of those "publishers" which are the principal beneficiaries of the historic ASCAP-BMI blanket licensing system.

When one of the entertainment companies, generally known as "packagers" in the broadcasting business, creates a television program for sale to a "network",* it normally employs writers to compose the thematic and background music, which in most instances constitutes the only music used on the program.** The packager has "shop rights" to the copyrights used in the same way as a manufacturer obtains "shop rights" to patents resulting from any invention made by his employees during the course of their employment. Thus, a packager could easily sell a complete

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* Virtually all of the entertainment programs shown on the NBC Television Network are produced and owned by independent outside packagers. This season, for example, NBC only produces one regularly-scheduled prime-time entertainment program—the one-hour weekly series, "Little House on the Prairie".

** In recent years, most of the entertainment programs shown on network television have not made use of music as a feature but rather for background or thematic purposes. Such music is usually written for the particular program.

package directly to the purchaser, not a package which cannot be shown on the air absent a blanket license from ASCAP and/or BMI. The packager's retention of music performance rights, its assignment of these to a "publisher" subsidiary, and its participation in the receipts of the copyright pools serves no economic need. The various considerations advanced to justify indirect, non-competitive licensing through music societies, such as the need for a common agency to police the use of copyrighted compositions and the difficulties in locating a widely dispersed body of composers, are totally absent in this kind of situation. The only thing accomplished is the elimination of competitive pricing for this one program element. Since virtually all of NBC's entertainment programs are acquired from outside purchasers, the anti-competitive impact of ASCAP's and BMI's practices is even more pronounced.

Early in 1970, NBC attempted to procure from ASCAP, under the consent decree in *United States* v. *ASCAP*, a so-called nucleus license rather than a blanket license on the millions of compositions in the ASCAP repertory. Thus, NBC requested a license limited to some 2,200 compositions and certain background music libraries contained in the ASCAP repertory which its studies showed were used with frequency on the NBC Television Network, or which were contained in programs NBC had "in the can". A comparable request was made of BMI. Such licenses would have permitted NBC to initiate direct licensing with packagers and other large-scale suppliers of music, thus satisfying a major portion of its music requirements through direct negotiations with the copyright owner.

ASCAP vigorously opposed NBC's request, contending that NBC was required to take a blanket license or nothing. A similar position was taken by BMI. NBC then applied to the District Court under the consent decree asking that

ASCAP be directed to offer the limited license requested. However, the District Court held in favor of ASCAP, holding that the decree did not require ASCAP to grant a license on anything less than its entire repertory. *United States* v. *ASCAP (Application of National Broadcasting Company)*, 1971 Trade Cas. ¶ 73,491 (S.D.N.Y. 1970).

NBC then appealed to the Court of Appeals for the Second Circuit (Docket No. 71-1487). The United States, in its capacity as plaintiff in the action, filed a brief urging reversal of the District Court's decision on the grounds that:

> "NBC . . . wants to begin dealing directly. ASCAP's refusal to cooperate is . . . not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." (Appendix to Petition for a Writ of Certiorari, hereinafter "Appendix", I, 12)

At this point, before its answering brief was due, ASCAP initiated settlement discussions with NBC which resulted in NBC's taking a blanket license from ASCAP in return for specified amounts. Subsequently, NBC also entered into a blanket license with BMI. In stipulating to dismissal of its appeal as moot, which was "so ordered" by the Court of Appeals on December 21, 1971, ASCAP expressly waived any *res judicata* or collateral estoppel effect with respect to the District Court's order and it was provided that the dismissal of the appeal was "without prejudice to any position that any party may take in any future proceeding" under the consent decree.*

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* NBC's licenses with ASCAP and BMI expired on September 30, 1976. Since that date, NBC has operated under interim licensing arrangements subject to retroactive adjustment.

While the prior opinion of this Court rejected the argument advanced by the United States in 1971 in the appeal of the NBC application, *i.e.*, that ASCAP's refusal to grant anything other than a blanket license gives rise to a *per se* antitrust violation, there is no suggestion in the opinion that the effect is not what the United States asserted it to be in its 1971 brief, *i.e.*, one of "maintaining prices". Such an effect, we respectfully submit, is clearly unreasonable in a situation where there is no necessity or justification for it, *i.e.*, in the case of network television broadcasting.

The decision of the Court of Appeals upon remand has again thrown the networks back to an all-or-nothing choice with its resultant anticompetitive effect and has done so without making the legal determination required by this Court to evaluate properly a restraint of trade.

In its opinion reversing the decision of the Court of Appeals that a blanket license is a *per se* antitrust violation, this Court remanded to the Court of Appeals, specifically directing it to apply a rule of reason analysis to ASCAP's and BMI's practices. In its opinion, however, the Court of Appeals circumvented the need for weighing the anticompetitive and procompetitive effects of the blanket licensing practice, by holding, in a startling reversal of its prior opinion, that conduct which it had initially declared to be *per se* an antitrust violation in fact had *no* anticompetitive effect. 620 F.2d 930, 939 (2d Cir. 1980).

Such an analysis, accordingly, stopped precisely at the point at which the rule of reason analysis begins. For as this Court recently stated, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers* v.

United States, 435 U.S. 679, 691 (1978). Indeed, the Court of Appeals itself observed, "A rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects." 620 F.2d at 934.

That the blanket license has at least some anticompetitive aspects was recognized by the United States as *amicus curiae* in its brief on remand, although it had argued in this Court that the blanket license was not a *per se* violation.

> "[W]e submit that the undisputed evidence of certain noncompetitive market characteristics which have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anticompetitive effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits." (Appendix H, 18-19) (footnote omitted)

Rather than weighing the anticompetitive and procompetitive effects of the blanket license upon the relevant market, the Court of Appeals instead relied upon what it perceived to be the feasibility of direct licensing to render the blanket practice wholly without restraining effect. 620 F.2d at 936-39. This conclusion ignores the fact that the very existence of the blanket licensing scheme inhibits the

development of direct licensing. If a network enters into a blanket license with ASCAP or BMI, it will have no incentive whatever to enter into a direct license with any member or affiliate of the licensing societies since to do so would, in effect, mean paying twice for the same music. Yet, to attempt to go the other route and secure the network's entire music needs by direct licensing would, under present conditions, expose the network to risks which no one is likely to assume. In short, the "blanket license or nothing" stance of ASCAP or BMI, now given the apparent blessing of the Court of Appeals, precludes the development of competition in music licensing. Not only is the license a restraint, but it is an unreasonable one in light of all the circumstances.

NBC respectfully submits that the determination of the Court of Appeals herein affirming the District Court failed to make the proper analysis under the rule of reason as mandated by this Court, and accordingly a writ of certiorari should again be granted, and the action should be remanded for an analysis taking into account the anticompetitive and procompetitive effects of the blanket licensing scheme.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
September 29, 1980

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